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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

NO. 860

DES PLAINES CURRENCY EXCHANGE, INC.,
an Illinois corporation,

Petitioner,

vs.

JOSEPH E. KNIGHT, Director of Financial Institutions,
and MARGARET M. KANE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Oral Argument Requested.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

THE OPINIONS BELOW, THE DATE OF THE JUDGMENT APPEALED FROM AND THE DATE THAT REHEARING WAS DENIED.

The opinion of the Supreme Court of Illinois was entered September 27, 1963 and reported in 29 Ill. 2d, 244. It is reprinted in full as Appendix I to this Petition. Judgment was entered by the Supreme Court of Illinois September 27, 1963.

The order of the Circuit Court of Cook County was entered December 5, 1962 and is reprinted in full as Appendix II to this Petition.

The administrative decision of Joseph F. Knight, Director of the Department of Financial Institutions, was entered August 21, 1962 and is not reported. The decision, together with the report and conclusions of the hearing officer is reprinted in full as Appendix III.

Petition for rehearing was denied November 25, 1963.

THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION

This Court's jurisdiction over this petition for *certiorari* is conferred by 28 USCA Section 1257, (c).

THE QUESTIONS PRESENTED FOR REVIEW.

The questions presented are:

1. Whether there is a violation of due process of law where an administrative decision is entered, based on a summary of evidence and conclusions and recommendations thereon made by an employee, secretly supplied to the decision-making authority without service thereof on the parties involved in the proceeding and without opportunity for said parties to be heard with reference thereto.

2. Whether it is a denial of due process of law for a State to refuse to provide any remedy or forum wherein a litigant can raise and have determined the question of whether an officer entrusted with the decision-making authority failed to examine the record upon which such decision must be based.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourteenth Amendment to the Constitution of the United States:

> "Section 1. . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 34.1 and 40.1 of the Illinois Community Currency Exchange Act, Illinois Revised Statutes, 1961, Chapter 16½.

> "34.1 Upon receipt of an application for a license for a community currency exchange, the Director shall investigate the need of the community for the establishment of a community currency exchange at the location specified in the application.
>
> " 'Community', as used in this Act, means a locality where there may or can be available to the people thereof the services of a community currency exchange reasonably accessible to them. If the issuance of a license to engage in the community currency exchange business at the location specified, will not promote the convenience and advantage of the community in which the business of the applicant is proposed to be conducted, then the application shall be denied. As amended by act approved May 31, 1957. L. 1957, p. 320."
>
> "40.1 . . .
>
> "The Director may, in his discretion, direct that any hearing pursuant to this Act, shall be held before a competent and qualified agent of the Director, whom the Director shall designate as the hearing officer in such matter. The Director, and the hearing officer, are

hereby empowered to, and shall, administer oaths and affirmations to all witnesses appearing before them. The hearing officer, upon the conclusion of the hearing before him, shall certify the evidence to the Director."

STATEMENT OF THE CASE.

Petitioner is the holder of a currency exchange license issued under the Illinois Currency Exchange Act. Respondent, Margaret M. Kane, filed application for the issuance of a currency exchange license four-fifths of a mile North east of the exchange owned by petitioner in Desplaines, Illinois. A hearing was held before a hearing officer appointed by respondent, Joseph E. Knight, Director of the Department of Financial Institutions, in whom statutory authority is vested to grant or deny applications for community currency exchange licenses under the tests provided in Section 34.1, *supra*. At the conclusion of the hearing, at which both parties were represented by counsel and submitted evidence, the hearing officer prepared a report containing findings of fact, conclusions and recommendations to the Director of Financial Institutions (Appendix III). This report was not made available to the parties nor were the parties advised of its existence until a copy of it was submitted to them, together with an order of the Director granting the application. No rehearing is provided for under Illinois law.

Petitioner, by his petition under the appropriate Illinois method of review, the Administrative Review Act (Illinois Revised Statutes, 1961, Chapter 110, Section 264), raised the following contentions, among others:

3. That said decision is further illegal; arbitrary, capricious and void, in that:

(a) The defendant, Joseph E. Knight, improperly delegated to a hearing officer the power of making recommendations as to the ultimate disposition of the application.

(b) The director improperly and illegally considered the recommendations and conclusions of the hearing officer, without giving counsel for the objector the opportunity to be heard in opposition to said conclusions.

(c) The director failed to examine the record of the proceedings prior to making the administrative decision complained of (Trans. 3, p. 44).

Inasmuch as petitioner had contended that such procedure was violative of the statutory requirements, petitioner did not specifically contend that the statute was in violation of the United States Constitution; thus, the question of denial of rights under the Federal Constitution was presented for the first time as a result of the decision of the Illinois Supreme Court and was asserted in a petition for rehearing (Trans. 13). The fact of their being so raised may be seen from the dissenting opinion of Mr. Justice Schaefer (filed December 1, 1962 subsequent to the denial of the petition for rehearing) in which he states: "Such a construction of the statute would comply with traditional requirements of procedural fairness and would make it unnecessary to decide the consitutional issues that otherwise remain unresolved." (Appendix 1.)

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

ARGUMENT.

I.

DUE PROCESS OF LAW IS VIOLATED WHERE AN ADMINISTRATIVE DECISION IS BASED ON RECOMMENDATIONS AND CONCLUSIONS OF A HEARING OFFICER SECRETLY SUPPLIED TO THE DECISION-MAKING AUTHORITY WITHOUT NOTICE TO THE PARTIES OR OPPORTUNITY TO BE HEARD THEREON.

This case involves a proceeding wherein the Supreme Court of Illinois has decided a matter of due process in a way probably not in accord with applicable decisions of this Court. In addition to this apparent divergence between the decision of the Supreme Court of Illinois and the decisions of this Court, later cited herein, such divergence also exists among other State and lower Federal Courts and the issue is further a source of dispute between other authorities in the area of administrative law.

The basic proposition of the petitioner as heretofore set forth is that where an administrative official having the power and duty of decision delegates the ministerial function of holding a hearing to a subordinate, due process requires that if said subordinate goes beyond the limited function of compilation of a record and makes findings of fact, conclusions and recommendations to the decision making authority, the adversaries before said authority are entitled to be advised of the existence and content of

such report so that they may correct omissions and misconceptions which may be contained therein and make arguments to suggest that the recommendations and conclusions are improper.

That petitioner's license is in the nature of a franchise or property right and thus protected by the Fourteenth Amendment is established by this Court's decision in *Frost vs. Corporation Commission of Oklahoma*, 278 U. S. 515, 73 L. Ed. 483, 49 S. Ct. 235. There this court held that the holder of a valid permit to operate a cotton gin, who was required to make a showing of public necessity in order to acquire a permit, had a property right in the nature of a franchise. This court, after pointing out that no one could operate such a cotton gin without a permit from the Commission and that permitees were subject to regulation and control by the Commission and that a permit should be denied where there was no public need, said: "It follows that the right to operate a gin and to collect tolls therefor . . . is not a mere license but a franchise, granted by the State in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the Fourteenth Amendment." Substantially the same requirements are contained in the Illinois Community Currency Exchange Act. The preamble thereof states (Ill. Rev. Stat. 1961 Chapter 16½, Section 30):

"The General Assembly has found and declares:

> "that the community currency exchange business, as hereinafter defined in Section 1, has become so widespread since the bank holiday in 1933, and so extensively and intimately integrated with the financial institutions of this State that it is affected with a public interest and should be licensed and regulated as a business affecting the convenience, general welfare, and economic interest of the people of this State;

> "that no community currency exchange should be operated without a license, or otherwise than in accordance with the regulations provided in, or to be provided pursuant to this Act;
>
> "that the number of community currency exchanges should be limited in accordance with the needs of the communities they are to serve . . .
>
> "that it is in the public interest to promote and foster the community currency exchange business and to assure the financial stability thereof;"

The Act then goes on to specify the need and convenience test for issuance of a license as set forth in Section 34.1 and provide other stringent regulations on the operation of this business. The Currency Exchange Act also provides in Section 56.2 that any licensee has the right to apply for an injunction to restrain operation without a license. While the Illinois Supreme Court has not directly passed upon the question of whether the license thus obtained amounts to a franchise, this recognition is implicit in the fact that petitioner was permitted to maintain this action, and said court has also directly recognized the right of a savings and loan association to oppose the grant of a license to a would-be competitor under a like Illinois statute. *North Federal Savings & Loan Association* v. *Becker*, 24 Ill. 2d, 514.

The first case in which this Honorable Court discussed the due process issue raised herein was *Gonzales* v. *U. S.*, 348 U. S. 407, 99 L. Ed. 467, 75 S. Ct., 409, wherein this Court held:

> "Just as the right to a hearing means the right to a meaningful hearing (citing cases), so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with an *awareness of the recommendations* and arguments to be countered."
> (empnasis supplied)

This issue was again before this Court in *Willner* v. *Committee on Character and Fitness* 373 U. S. 96, 10 L. Ed. 2nd 224, 83 S. S. Ct. 1175, wherein the New York Committee on Character and Fitness had not made available to Willner a report made to the New York Court which upheld his exclusion from the practice of law. This Court there said:

"* * * It does not appear from the record that either the Committee or the Appellate Division, at any stage in these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character. Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division. *Goldsmith* v. *United States Board of Tax Appeals*, 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215, *supra*; cf. Re. Oliver, 333 U. S. 257, 273, 92 L. Ed. 682, 693, 68 S. Ct. 499. There seems no question but that petitioner was apprised of the matters the Committee was considering.

"'But a "full hearing"—a fair and open hearing—requires more than that. . . . Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.' *Morgan* v. *United States*, 304 U. S. 1, 18, 19, 82 L. Ed. 1129, 1132, 1133, 58 S. Ct. 773, 999.

"Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, "the requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." Id. 304 U. S. at 20. Cf. *Gonzales* v. *United States*, 384 U. S. 407, 414, 99 L. Ed. 467, 472, 75 S. Ct. 409."

Historically, the leading case on this proposition prior to this Court's investigation into the issue was *Mazza* v. *Cavicchia*, 15 N.J. 498, 105 Atl. 2nd 545. This was a proceeding wherein a "hearer" had heard testimony and made conclusions and reported the same to the Director without making them available to the parties. In stating the reasons why such practice is inherently dangerous, the Court said:

> "The hearer may have drawn some erroneous conclusions in his report, or he may even have made some factual blunders. Such mistakes are not uncommon in both judicial and administrative proceedings; indeed, the whole process of judicial review in both fields is designed to guard against them. But, if a party has no knowledge of the secret report or access to it, how is he to protect himself? An unjust decision may very likely be the result where no opportunity is given to those affected to call attention to such mistakes. That is why it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert. In the instant case the hearer can be characterized as a "witness" giving his evidence to the judge behind the back of the appellant, who has no way of knowing what has been reported to the judge. Indeed, at one stage of the agency's history, if not now, it was the practice for the Commissioner to confer with the hearer regarding the facts or the conduct of the hearing. Such conduct not only constitutes a violation of the principle of the exclusiveness of the record in deciding controversies, but it shocks one's sense of fair play on which our fundamental concepts of procedure are based."

The Court then concluded:

> "Where, as here, the final decision is rendered by one who did not hear the evidence but relies, in part at

least, upon the findings and report of the hearing officer, there is an obvious danger that the decision may be based on findings set forth in the hearer's report that are not supported by the evidence. To guard against this danger and to accord the appellant the fair play to which he is entitled it is essential that prior to its submission to the deciding officer the hearer's report be made available to the parties and that they then be given an opportunity to correct any mistakes that may appear in the report. This simple requirement, while imposing no hardship on the agency, does protect the individual against the strong possibility of a miscarriage of justice or the suspicion thereof."

Prior to the Mazza decision it had been held, by other State and Federal Courts, as was indicated by the Supreme Court of Illinois in its decision, that there was no due process requirement that such a report be made available to the parties *Peoria-Braumeister Company* v. *Yellowley*, 123 Fed. 2d. 634, *Elite Dairy Products, Inc.* v. *Ten Eyck*, 271 N.Y. 488 and *Radacy* v. *U. S. Smelting, Refining and Mining Company*, 62 Ariz. 464.

An interesting illustration of the sharp clash of views on this issue may be seen by contrasting the views of two respected administrative law authorities. Professor Davis in 2 Davis Administrative Law, Section 11.09 calls the decision in Mazza a "spectacular exception". Professor Bernard Schwartz, however, in 34 New York University Law Review 691, says at page 740:

"In his already-referred-to article, Professor Davis is especially critical of the Mazza opinion. 'The New Jersey court' he declares, 'has tried to push the exclusiveness principle too far'. 'The law of the future,' he asserts, is not likely to follow the Vanderbilt attitude in this case.

"It is, of course, somewhat rash to venture into print with predictions on the future development of the law,

> So far as one can see, however, the 'law of the future' is far more likely to follow the approach of Vanderbilt in Mazza than that of its critics. Thus, a New York court has expressly relied upon the reasons given in Mazza in holding a hearing officer's secret report illegal and the United States Supreme Court has cited the Vanderbilt opinion with apparent approval in a case following essentially the same approach. . . ."

The United States Supreme Court decision referred to is *Gonzales* v. *U. S.*, *supra*. The New York case is *O'Meally* v. *Rohan*, 142 NYS 2d, 239, wherein the Court expressly adopted Mazza in overturning an administrative decision.

The desirability, as well as the constitutional necessity of the procedure indicated in Mazza, is reflected in a later New Jersey case, *Fifth Street Pier Corp.* v. *City of Hoboken*, 22 N.J. 326, 126 Atl. 2d 6, wherein a dissenting judge in Mazza in speaking for the Court said:

> "'If it be urged that the courts measure the requirements of a fair hearing through the necessities of the governing rather than the governed, it will be sufficient answer to call attention to the administrative procedure acts which have been enacted by both federal and state governments, all of which permit the parties to file exceptions to an examiner's report prior to the final agency decision. Federal Administrative Procedure Act, 5 U. S. C. A. Sec. 1007 (b); and see Harris, Administrative Practice and Procedure: Comparative State Legislation, 6 Okl. L. R. 29, 49-53 (1953). Section 10 of the Model State Administrative Procedure Act (1946) is indicative. It provides, *inter alia*:
>
> "'Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties,

and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portion thereof as may be cited by the parties."

"The legislative history of the federal act (5 U. S. C. A. Sec. 1001 *et seq.*) indicates that its framers thought the legislation set down elemental rules of fairness. 92 Cong. Rec. 2151 (1946); Sen. Doc. No. 248, 79th Cong. 2d Sess. vi (1946). . . .

"We are dealing here with elemental procedural safeguards which look to long range protection. . . . Where this is the case *sound judgment dictates that the matter be remanded to allow the parties the opportunity which due process affords them in the administrative process.*" (emphasis supplied)

We respectfully submit that the decisions of this court hereinabove cited compel the conclusion that procedural due process has been denied in the administrative procedure adopted in this case.

We further submit that not only the Supreme Court of Illinois' failure to follow the *Gonzales and Willner* decisions, but also the disagreement of lower federal courts and courts of other jurisdictions on this fundamental constitutional and administrative law issue should impel this court to take jurisdiction in this cause and definitively set forth the constitutional safeguards to be observed by administrative agencies in this area.

Petitioner recognizes that this court will not pass upon a constitutional question where such has not been decided by the State Court and concededly the Supreme Court of Illinois did not expressly decide the question raised herein. The Court said:

> "A decision on this question is not, however, necessary in the present case, for there is nothing in the record before us to indicate that the hearing officer's report was unavailable to the parties prior to the Director's decision or that the plaintiff ever requested a copy of said report, which was dated 13 days prior to the Director's order."

Mr. Justice Schaefer provides the best answer to this avoidance and we quote his observation as our complete argument on this point: "But the record does not suggest that the plaintiff knew or could have known of the existence of the report, and in view of the limited authority given to the hearing officer by the statute the plaintiff had no reason to anticipate the existence of such a report."

The statement of this Court in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 321 U.S. 287, 85 L. Ed. 836, 61 S. Ct. 552, furnishes a clear basis for looking behind the State Court's avoidance of this issue: "Still it is of prime importance that no constitutional freedom, least of all the guarantee of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the State Courts where a claim of constitutionality is effectively made" (page 293).

While Mr. Justice Schaefer finds that as a result of the State Court's failure to face the question "the constitutional issues . . . otherwise remain unresolved", his conclusion is prospective only. As to petitioner, they have, unless this Court intervenes, been finally and conclusively resolved against it.

II.

THE STATE'S FAILURE TO PROVIDE A MEANS FOR RAISING WHAT, IF PROVED, WOULD BE CONCEDED DENIAL OF A CONSTITUTIONAL RIGHT, ITSELF RESULTS IN A VIOLATION OF DUE PROCESS OF LAW.

It was the petitioner's contention in the State Courts that the Director had failed to read the record and a direct allegation of fact in this regard was made by petitioner. In connection therewith petitioner pointed out the total failure of the record to reflect to the contrary. The Illinois Supreme Court recognized the constitutional requirement laid down in *Morgan* v. *U. S.*, 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906 which holds:

> "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

by quoting not only that case but an Illinois decision following it, *Illini Coach Co.* v. *Commerce Commission*, 408 Ill. 104.

But, conceding the correctness of the proposition the Court, in canvassing the record, found no evidence that the Director had not examined it (i.e. the Director did not *say* that he did not read it), and then relied upon a presumption that the Director read and considered the evidence. Standing alone the creation of such a presumption under a statute which the Supreme Court of Illinois interprets as not permitting the introduction of any evidence following the administrative decision (which is obviously the first point in time at which a litigant could determine the fact), is not surprising, but the Supreme Court of Illinois, in *Illini Coach Co., supra*, specifically held that such a claimed de-

fect could not be raised in a *collateral* attack. If, under Illinois law, a failure to examine evidence is a deprivation of due process and if, under Illinois law, such deprivation cannot be raised collaterally (*Illini Coach Co.*) or directly (the instant decision below), there is in fact no remedy for raising what constitutes a conceded denial of constitutional rights.

We respectfully submit that a rule of law which first declares an act constitutionally essential in the administrative process and then declares that there is no existing remedy, direct or collateral, to illustrate its absence is an absurdity. The approach taken by the Supreme Court of Illinois in the instant case is unfortunately reminiscent of what was recently suggested to be an Illinois procedural merry-go-round in the criminal field, wherein any attempted remedy turned out to be improper as a matter of Illinois law. (*Marino* v. *Ragen*, 332 U. S. 561, 570, 92 L. Ed. 170.)

In *Young* v. *Ragen*, 337 U. S. 235, 93 L. Ed. 1333, 69 S. Ct. 1073, this Court said, page 238:

> "Of course we do not review decisions which rest upon adequate non-federal grounds and, of course, Illinois may choose the procedure it deems appropriate for the vindication of federal rights." *Loftus* v. *Illinois*, 334 U. S. 804, 92 L. Ed. 1737, 68 S. Ct. 1212. But it is not simply a question of State's procedure when a State court of last resort closes the door to *any* consideration of a claim of denial of a federal right." (emphasis by the Court).

CONCLUSION.

For reasons apparent upon the record and urged in this petition, it is respectfully submitted that this Court should issue its writ of certiorari to review and reverse the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

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APPENDIX I.

Docket No. 37763—Agenda 82—May, 1963.

Des Plaines Currency Exchange, Inc., Appellant, v. Joseph E. Knight, Director of Financial Institutions, *et al.*, Appellees.

Mr. Justice Hershey delivered the opinion of the court:

Plaintiff, Des Plaines Currency Exchange, Inc., brought this suit in the circuit court of Cook County under the Administrative Review Act, (Ill. Rev. Stat. 1961, chap. 110, pars. 264 to 279) against Joseph E. Knight, Director of the Department of Financial Institutions, and Margaret M. Kane, to review the issuance of a community currency exchange license by the Director to Margaret M. Kane. The trial court entered an order affirming the decision of the Director and an appeal was taken directly to this court pursuant to section 22.02 of the statute regulating community currency exchanges. Ill. Rev. Stat. 1961, chap. 16½, par. 52.2.

Plaintiff is the owner of a community currency exchange located at 1510 Miner Street, Des Plaines, Illinois. Defendant Margaret M. Kane filed application for the issuance of a currency exchange license at 1100 Lee Street, which is 8/10ths of a mile northeast of the Des Plaines Currency Exchange. Plaintiff objected to said issuance on the ground that its financial structure would be impaired thereby.

Pursuant to the Currency Exchange Act (Ill. Rev. Stat. 1961, chap. 16½, par. 40.1) and the Personnel Code (Ill. Rev. Stat. 1961, chap. 127, par. 63b101 *et seq.*) the Director designated a hearing officer to hear evidence on the applica-

tion of Margaret M. Kane for the issuance of a community currency exchange license. The hearing officer heard evidence regarding the application and submitted the same to the Director, together with certain findings of facts and recommendations based thereon. These findings and recommendations were in substance that there is little or no financial service within six or eight blocks of the proposed location; that the plaintiff is located in the largest shopping center, which is the heart of Des Plaines; and that its business comes from no specific area; that the existing currency exchange is not reasonably accessible to the entire community of the city of Des Plaines; that the issuance of a license to the defendant at the proposed location will promote the convenience and advantage of the community; that the plaintiff failed to establish that the issuance of the instant license will affect the financial stability of the plaintiff; and that there is need in the community for the establishment of a currency exchange at the location specified in the application.

The Director entered an order adopting the "findings of fact, recommendations and conclusions of Robert J. Downing, the Hearing Officer," and ordering that the application of Margaret M. Kane for a community currency exchange license be granted. In seeking reversal of the circuit court's decision affirming the Director's order the plaintiff contends, first, that the Director failed to make an independent examination of the evidence before entering his administrative decision, and that the Director's reliance upon conclusions and recommendations of a hearing officer, not being authorized by the statute, deprived plaintiff of a fair hearing.

The currency exchange statute provides that the Director may, in his discretion, direct that the hearing provided for in said act shall "be held before a competent and qual-

ified agent of the Director, whom the Director shall designate as the hearing officer in such matter." The hearing officer under the statute is empowered to administer oaths and affirmations to all witnesses and "upon the conclusion of the hearing before him, shall certify the evidence to the Director."

It is fundamental that a decision pursuant to an administrative hearing must be based upon testimony and other evidence received at the hearing and that a conclusion influenced by extraneous considerations must be set aside. (*Morgan* v. *United States*, 298 U. S. 468, 80 L. ed. 1288.) As we stated in *Illini Coach Co.* v. *Commerce Com.* 408 Ill. 104, at page 109: "The substance of these decisions is that the parties before an administrative body exercising *quasi*-judicial powers are entitled to have that body base its decision upon the facts disclosed by the evidence, and that a failure of such body to acquaint itself with the facts as revealed by the evidence, if proved, is sufficient ground to warrant setting aside its order."

The plaintiff, in support of his contention that the Director failed to consider the evidence submitted by the hearing officer in making his purported findings and conclusion, points out that the Director no place in the record denied the allegation that he failed to consider the evidence, and that nothing in the record indicates that the Director examined the evidence. The Administrative Review Act does not require the defendant to deny the allegation of the party seeking review. (*Jewell* v. *Carpentier*, 22 Ill. 2d 445.) In this latter case this court rejected the contention that undenied allegations in a complaint for administrative review stand admitted under section 40 of the Civil Practice Act. (Ill. Rev. Stat. 1961, chap. 110, par. 40.) This court further stated that the Administrative Review Act does not contemplate that issues of fact shall be framed by complaint

and answer. The review under the act is upon the record of the administrative agency and the provisions of the Civil Practice Act do not apply.

The Community Exchange Act does not contemplate that the Director actually hear each case and in fact expressly authorizes the designation of a subordinate hearing officer. The rule requiring that an administrative decision be based upon evidence introduced at the hearing "does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. *Evidence thus taken may be sifted and analyzed by competent subordinates.*" (Emphasis added.) (*Morgan* v. *United States*, 298 U. S. 468, 481.) The principal requirement from a constitutional point of view is that "the officer who makes the determinations must consider and appraise the evidence which justifies them." 298 U. S., at 482.

The trial court expressly found that the findings of fact and conclusions of the hearing officer correctly and accurately abstracted the record of the hearings held before him and therefore that the order of the Director correctly reflected the testimony offered in said proceedings. The plaintiff does not dispute this finding and thus no question of the consideration by the Director of matters outside the record is here presented. The fact that the Director in the order approving the application adopted the findings of fact, recommendations and conclusions of the hearing officer, which were submitted to him attached to the entire transcript of proceedings, does not establish, as plaintiff contends, that the Director did not read the transcript of testimony and exhibits, or that he based his decision entirely upon the summary, findings and recommendations of the hearing officer.

On the contrary, under the presumption of regularity that attaches to the acts of public officials, it must be assumed that the Director was fully informed when he rendered his final decision. Unlike the Illinois Savings and Loan Act, (*See Harvey Federal Savings and Loan Association* v. *Becker*, 25 Ill. 2d 464), there is no requirement under the currency exchange law of Illinois that the Director, in approving an application, make independent findings of fact, nor is there any evidence in this case that the Director did not examine the evidence presented to him by the hearing officer who conducted the hearing with all interested parties present.

The Director is entitled to a presumption that all his official acts have been regular, (*United States* v. *Chemical Foundation*, 272 U. S. 1, 71 L. ed. 131,) and this presumption extends to his having read and considered the evidence. 2 Davis, Administrative Law, sec. 11.06 (1958).

The appellant also relies upon *Mazza* v. *Carucchia*, 15 N. J. 498, 105 A. 2d 545, wherein the New Jersey Supreme Court held that, under the aforementioned principle of the exclusiveness of the record, an interim report or statement of findings of fact, such as was submitted in the present case, must be made available to the parties prior to the agency's final decision, so that an opportunity will exist to correct any factual mistakes or erroneous conclusions. Although it is indisputable that the procedure of submitting the examiner's report to the parties prior to a final decision is desirable from a practical point of view, the *Mazza* decision, insofar as it establishes this procedure as a constitutional prerequisite to a fair hearing, has been criticized as an unwarranted limitation upon "the general rule that administrative officers are free to consult with noninvestigating and nonprosecuting staffs and that the only limits have to do

with personal consideration of records and with use of extra-record facts.' (2 Davis, Administrative Law, sec. 11.09.) A conclusion opposite to that of the *Mazza* case has been reached by several other courts. (See, *e. g.*, *Peoria Baumeister Co.* v. *Yellowley*, (7th cir.) 123 F. 2d 637; *Elite Dairy Products, Inc.* v. *Ten Eyck*, 271 N. Y. 488; *Radaca* v. *United States Smelting, Refining and Mining Co.* 62 Ariz. 464.) A decision on this question is not, however, necessary in the present case for there is nothing in the record before us to indicate that the hearing officer's report was unavailable to the parties prior to the Director's decision or that the plaintiff ever requested a copy of said report, which was dated 13 days prior to the Director's order.

Plaintiff also contends that the statutory requirement of a certification of the proceedings before the hearing officer was not complied with, (Ill. Rev. Stat. 1961, chap. 16½, par. 40.1) and that the applicant did not, at the time of filing her application or at the time of hearing thereon, have a lease or suitable evidence of permanency at the location applied for as required by the statute. (Ill. Rev. Stat. 1961, chap. 16½, par. 48.) These points were not, however, raised before the trial court and are not, therefore, preserved on this appeal. See, *e. g.*, *Jewell* v. *Carpentier*, 22 Ill. 2d 445.

The allegation in plaintiff's complaint that the Director's decision was against the manifest weight of the evidence was expressly waived by the plaintiff on this appeal. No other errors being urged, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Mr. Justice Schaefer dissenting:

The statutory authority of the hearing officer was limited. At the conclusion of the hearing he was to "certify the evidence to the Director." (Ill. Rev. Stat. 1961, chap. 16½, par. 40.1.) He exceeded his statutory authority, and made findings of fact, recommendations and conclusions. The Director, in his order granting the license, adopted the findings of fact, recommendations and conclusions of the hearing officer. It may be arguable that authority to make findings of fact should be implied from authority to conduct a hearing and certify the evidence. (See, *Crowe* v. *Industrial Com.* 104 Utah 333, 140 P. 2d 321; *cf. United States ex rel. Ohm* v. *Perkins*, (2d cir. 1935) 79 F. 2d 533.) But I do not see how it can be argued that authority to conduct a hearing and certify the evidence implies authority to make recommendations and conclusions.

In *Harvey Federal Savings and Loan Ass'n* v. *Becker*, 25 Ill. 2d 464, we held that the Director could not consider recommendations that were not authorized by statute. (See also, *North Federal Savings and Loan Ass'n* v. *Becker*, 24 Ill. 2d 514-520.) The opinion of the court distinguishes the *Harvey* case on the grounds that the statute now before us does not require independent findings of fact, and that the Director is not shown to have ignored the evidence. But those circumstances were not relevant to our decision in the *Harvey* case. The Director there had made appropriate findings and the question was whether his decision to issue a license was invalidated by the consideration that he gave to unauthorized recommendations. If in the present case the majority correctly assumes that the evidence has been properly considered, the precise issue is, just as it was in *Harvey*, whether the Director may consider recommendations that have no legislative sanction.

Moreover, the assumed statutory difference is non-existent. The statute before us in the *Harvey* case provided: "The Director shall not approve the application and issue a permit to organize unless he shall find: * * *." (Ill. Rev. Stat. 1961, chap. 32, par. 724.) The statute before us in the present case provides: "If the application is denied, the Director shall * * * prepare * * * a written order of denial thereof, which shall contain his findings with respect thereto * * *." (Ill. Rev. Stat. 1961, chap. 16½, par. 40.) Both statutes place upon the Director the same duty to make findings.

The second question in this case is whether the report submitted to the Director shall have been made available to the parties. The court's opinion does not reach this issue because it finds that there is no proof that the hearing officer's report was unavailable, or that the plaintiff ever requested a copy of it. But the record does not suggest that the plaintiff knew or could have known of the existence of the report. And in view of the limited authority given to the hearing officer by the statute, the plaintiff had no reason to anticipate the existence of such a report.

If the statute is to be construed as authorizing the hearing officer to make "findings; recommendations and conclusion," it should also be construed to require that those findings, recommendations and conclusions be disclosed to the parties. Such a construction of the statute would comply with traditional requirements of procedural fairness and would make it unnecessary to decide the constitutional issues that otherwise remain unresolved.

(Dissenting Opinion filed December 9, 1963.)

APPENDIX II

Order.

This cause coming on to be heard on plaintiff's amended complaint under the Administrative Review Act and defendants answer thereto consisting of the record of the proceedings had before the Director of Financial Institutions, and the Court having examined the record and heard the arguments of counsel and being fully advised in the premises, the Court Finds:

1. That the Report and Conclusion of the Hearing Officer Robert J. Downing, who was appointed Hearing Officer by the Director of Financial Institutions in this Cause, correctly and accurately abstracts the record of the hearings held and the evidence taken and transcribed in said hearings before him.

2. That the Order of the Director of Financial Institutions of the State of Illinois, Joseph E. Knight, granting the applications of Margaret M. Kane, for a Community Currency Exchange at 1100 South Leg Street, Des Plaines, Illinois, correctly reflects the testimony offered in said proceedings.

3. That the Order of the Director is not against the manifest weight of the evidence.

It Is Therefore Ordered, that the decision of the Director of Financial Institutions be and is hereby affirmed.

It Is Further Ordered that the Court expressly finds that that there is no just reason for delaying the enforcement

of this decree or for delaying the taking of an appeal therefrom, or any and all Orders heretofore entered.

ENTER

CHARLES S. DOUGHERTY,
Judge.

Dated Dec. 5, 1962.

APPENDIX III.

REPORT AND CONCLUSIONS OF HEARING OFFICER.

The following documentary evidence was admitted:

DIRECTOR'S EX. NO. 1—Investigation report of Bernie L. Zoden, Investigator, Ambulatory and Community Currency Exchange Division, stating that the proposed location is situated within a one-story brick building. Lee Street, north and south of the proposed location, is primarily commercial in character with two industrial plants located on the east side of that street. Adjacent streets are primarily residential in character. The report also states that one (1) licensed currency exchange, two (2) national banks, two (2) savings and loan associations, five (5) money order agencies and one (1) licensed remittance agent are located and operating within a radius of approximately eight-tenths (8/10) mile of the proposed location. The report further states that there are two (2) additional licensed currency exchanges located and operating within a radius of approximately four and four-tenths (4 4/10) miles of the proposed location, three (3) additional money order agencies located and operating within a radius of approximately two (2) miles of the proposed location; six (6) licensed, ambulatory currency exchanges located and operating within a radius of approximately one and three-quarters ($1\frac{3}{4}$) miles of the proposed location.

DIRECTOR'S EX. NO. 1-A. Supplemental Investigation Report of Bernie L. Zoden, stating that a letter of objection to the issuance of a Community Currency Exchange license at 1100 South Lee Street, Des Plaines, Illinois, was received from the Des Plaines Currency Exchange, 1510 Miner Street, Des Plaines, Illinois.

DIRECTOR'S EX. NO. 2—A map of Des Plaines, Illinois, showing the proposed location of currency exchanges, banks, savings and loan associations, money order agencies, remittance agents, and ambulatory currency exchanges in the area (See Director's Ex. No. 1).

APPLICANT'S EX. NO. 1—Application for license to operate a community currency exchange from Margaret M. Kane, d/b/a Lee-Algonquin Currency Exchange, at 1100 South Lee Street, Des Plaines, Illinois.

APPLICANT'S EX. NO. 3—A map showing a Northwest section of Chicago and Des Plaines, Illinois, and indicating the proposed location and the location of various other financial institutions in these areas.

APPLICANT'S EX. NO. 5—A map of the area of Des Plaines, Illinois, dated December 31, 1961.

APPLICANT'S EX. NO. 10, 11, and 12—New Building Surveys of the Chicago area, including Des Plaines, Illinois, issued by Bell Savings and Loan Association, Chicago, Illinois.

OBJECTOR'S EX. NO. 1 and 2—Lease agreement entered into between Julia Baines and William R. Kane for the store at 1100 Lee Street, Des Plaines, Illinois, contingent upon William R. Kane obtaining a currency exchange license from the Department of Financial Institutions.

OBJECTORES EX. NO. 3—A map of the City of Des Plaines showing the block by block distribution of signature cards and money order requests from a sample taken at the Des Plaines Currency Exchange.

OBJECTOR'S EX. NO. 5—Financial statements of the Des Plaines Currency Exchange as of December 31, 1961.

The following witnesses testified substantially as follows:

JULIA BAINES testified she is a real estate broker and is in the insurance business at 1098 Lee Street, Des Plaines, which is in the same building as the proposed location; that she entered a lease agreement with the applicant for the store at 1100 Lee Street, the proposed location, in September of 1961; that in her opinion there is a tremendous need for a currency exchange as there is no financial service within six or eight blocks of the proposed location; that the exchange would be a convenience because there is no place around for notarizing papers, etc.; that the proposed location is in the middle of the shopping center with three large parking lots available; and that merchants in the area were enthusiastic about the possibility of the proposed exchange.

WILLIAM R. KANE testified he is a real estate and insurance broker and that he, together with his wife, will manage the currency exchange if the license is granted; that he and his wife are the owners of the Edison Park Currency Exchange, Inc., at 6689 Northwest Highway, and he individually owns Harlem-Plaza Currency Exchange, 4196 North Harlem Avenue, Norridge, Illinois; that he was very familiar with the area of Des Plaines; and that the O'Hare International Airport which adjoins the south boundary of the city of Des Plaines, is being expanded and such expansion will necessitate the employment of an additional number of people. The witness also testified he was familiar with the objector's currency exchange at 1510 Miner Avenue, Des Plaines, Illinois; that the objector's exchange is in the principal business district in the City of Des Plaines; that the proposed location is near the intersection of Lee and Algonquin and is in a commercial area which

includes some 26 stores; that on Lee Street south of Algonquin there are two motels, an iron works, a paper company, and the General Molding Products Corporation; and that in the four to five square mile area west of the proposed location there are no currency exchanges, check-cashing agencies or money order services. The parties, by their attorneys, stipulated to certain facts regarding this witness' testimony concerning the area of the proposed location. Included in this testimony was the location of other currency exchange facilities. Their location and their distance from the proposed location is as follows: (1) Des Plaines Currency Exchange, 1510 Miner Street, Des Plaines—9/10 mile north; (2) Edison Park Currency Exchange, 6689 Northwest Highway, Chicago—5.3 miles east; (3) Mount Prospect Plaza Currency Exchange, Rand and Central Roads, Mount Prospect—4.1 miles northwest; (4) Market Place Currency Exchange, Elmhurst and Golf Roads—4.5 miles northwest; and (5) Mannheim Road Currency Exchange, 2322 N. Mannheim Road—8.0 miles south. The witness also testified the proposed area can be compared to a like area, most of which is in Chicago and Niles, and that this comparative area has eight community currency exchanges, six savings and loan associations, and four banks, while the City of Des Plaines, or proposed area, has only one community currency exchange, two savings and loan associations and two banks.

Douglas John Tigert testified he is a graduate student at Northwestern University and that he was recently engaged in a survey of various currency exchanges within the territory of Cook County, Illinois; that the study showed that 78 per cent of exchange

customers live within one-half (½) mile and 88 per cent live within one (1) mile of the particular exchange; that of 675 exchanges in Chicago, he selected nine in which to conduct his survey; and that the survey did not reflect how far the customers would have to travel to other exchanges.

BERNIE L. ZODEN, called by the objectors, testified he is an investigator for the Department of Financial Institutions and, in that capacity, he made an investigation, the report and supplemental report of which were admitted here in evidence; that he made a random check of the signature cards and money order requisitions and, using the Chicago Northwestern Railroad tracks as a dividing line, he found: (1) 16 per cent of the money order requests were from north of the tracks and 30.5 per cent were transient (outside Des Plaines); (2) 41.2 per cent of the signature cards were south of the tracks and 47.7 per cent were transient; and that this check shows there is no concentration of business from one area. The witness also testified he observed the operation at the Des Plaines Currency Exchange and found two persons on duty there; that there is meter parking directly in front of the exchange; that there is a railroad station across the street and all four of the City of Des Plaines bus lines pass the Des Plaines Currency Exchange; that he also observed the surroundings of the proposed exchange; that there are no stores in that shopping center which cash checks or write money orders, but National Tea (about a block away) will cash checks for customers; and that there is also an A & P store and a Grocerland store in the area which will cash checks.

PHILLIP J. MIZOCK testified he operates two currency exchanges, one of which is the objector at 1510 Miner Street in Des Plaines; that the shopping area in and around this exchange is in the heart of the City of Des Plaines and at least 75 per cent of the people who reside in Des Plaines patronize this community; that people come from as far as Bensenville to the area; that his services are adequate for these people because of improvements he has made; that there are two large banks and two savings and loan associations in the area; and that his competition comes from these banks, savings and loan associations, and a half-dozen stores which sell money orders. The witness also testified three currency exchanges which render competition to him have been licensed since he acquired the exchange; that he is also in competition with the Chicago exchanges because many Des Plaines people work in Chicago; and that, in his opinion, there is no need for a new currency exchange in Des Plaines and the issuance of a license to another exchange would seriously jeopardize his investment of $85,000, most of which is attributed to good will.

Findings and Conclusions of Hearing Officer.

In addition to the above and foregoing abstract of the testimony of the witnesses from the transcript of the record and summary of documentary evidence, all of which may be taken as findings of fact, the following findings and conclusions are set forth from the record:

1. The applicant, Margaret M. Kane, d/b/ Lee-Algonquin Currency Exchange, seeks a license to operate a community currency exchange at 1100 South Lee Street, Des Plaines, Illinois.

2. The objector, Des Plaines Currency Exchange, is presently operating such an exchange at 1510 Miner Street, Des Plaines, Illinois, which is nine-tenths (9/10) of a mile from the proposed exchange.

3. The following currency exchanges are located within the designated distance from the proposed location;

Name and Address	Proximity to Location
Edison Park Currency Exchange, 6880 Northwest Highway	5.3 miles east
Mount Prospect Plaza Currency Exchange, Rand and Central Roads	4.1 miles northwest
Market Place Currency Exchange, Elmhurst and Golf Roads	4.5 miles northwest
Mannheim Road Currency Exchange, 2322 North Mannheim Road	8.0 miles south

4. The primary area to be served is the City of Des Plaines, Illinois.

5. The record indicates that there is little or no financial service within six or eight blocks of the proposed location.

6. The record indicates that the proposed location is in a shopping area which includes some 26 stores.

7. The record indicates that the objector, Des Plaines Currency Exchange, is located in the largest shopping center, which is in the heart of Des Plaines and their business comes from no specific area.

8. The evidence established that the existing currency exchange is not reasonably accessible to the entire community of the City of Des Plaines.

9. The evidence established that the issuance of a license to the applicant at the location specified will promote the convenience and advantage of the community in which the business of the applicant is proposed to be conducted.

10. The objector failed to establish the the issuance of the instant license will affect the financial stability of the objector.

11. The evidence establishes that there is a need in the community for the establishment of a community currency exchange at the location specified in the application.

For the reasons herein set forth, it is the conclusion and the recommendation of the Hearing Officer that the application for a license to operate a Community Currency Exchange at the proposed location should be granted.

Dated this 8th day of August, 1962.

Robert J. Downing,
Hearing Officer.

Order of Director of Department of Financial Institutions.

The Director of Financial Institutions adopts the findings of fact, recommendations and conclusions of Robert J.

Downing, Hearing Officer, attached to the transcript of proceedings and hearing, bearing date of August 8, 1962.

It is, therefore the order of the Director of Financial Institutions of the State of Illinois, that the application of Margaret M. Kane, for a Community Currency Exchange license to operate a Community Currency Exchange at 1100 South Lee Street, Des Plaines, Illinois, be granted.

Dated this 21st day of August A. D. 1962.

/s/ Joseph E. Knight

Director of Financial Institutions.

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No. 860

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

DES PLAINES CURRENCY EXCHANGE, INC., an Illinois Corporation,

Petitioner,

vs.

JOSEPH E. KNIGHT, DIRECTOR OF FINANCIAL INSTITUTIONS, and MARGARET M. KANE,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENT MARGARET M. KANE'S BRIEF IN OPPOSITION

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

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DES PLAINES CURRENCY EXCHANGE, INC., an Illinois Corporation,

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JOSEPH E. KNIGHT, DIRECTOR OF FINANCIAL INSTITUTIONS, and MARGARET M. KANE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

RESPONDENT MARGARET M. KANE'S BRIEF IN OPPOSITION.

JURISDICTION.

This Court lacks jurisdiction over the Petition for Certiorari filed in this proceeding. 28 USCA Section 1257(3) fails to confer jurisdiction because no federal right is in any way involved. Furthermore, no federal question was ever properly raised in the Illinois Courts.

and the Supreme Court of Illinois did not determine a federal question. The decision of the Supreme Court of Illinois is predicated upon entirely adequate non-federal grounds.

Arguments in support of these contentions will be presented in later portions of this Brief in Opposition.

QUESTIONS PRESENTED.

In its statement of "Questions Presented", the Petitioner assumes certain facts which are unsupported by anything in the Record. In the first place, there is no evidence that the administrative decision was "based" upon the report of the hearing officer. Secondly, and as noted in the opinion of the Supreme Court of Illinois, "—there is nothing in the record before us to indicate that the hearing officer's report was unavailable to the parties prior to the Director's decision or that the (petitioner) ever requested a copy of said report—". The only real questions presented upon the Record before this Court are:

(1) Whether the decision of the Illinois Director of Financial Institutions granting respondent Margaret Kane's application for a currency exchange license was based upon the testimony and other evidence received at the administrative hearing; and

(2) Whether the submission to the Director of Financial Institutions of a hearing officer's findings of fact, recommendations, and conclusions necessarily establishes that the Director based his decision on matters other than the testimony and exhibits.

STATEMENT.

In the summer of 1962, respondent Margaret M. Kane made application for the issuance of a license to operate a currency exchange pursuant to the Provisions of the Illinois Community Currency Exchange Act (Ill. Rev. Stats. 1961, Ch. 16½). Such a currency exchange would be licensed to engage in the business of cashing checks, drafts, or money orders for a fee, and issuing its own money orders (Ill. Rev. Stats. 1961, Ch. 16½, par. 31). The proposed currency exchange was to operate in one of 26 stores located in a shopping center in DesPlaines, Illinois, a suburb of Chicago.

In accordance with the terms of the Community Currency Exchange Act, a hearing was held by a hearing officer designated by respondent Joseph E. Knight, Director of the Department of Financial Institutions. The hearing officer heard evidence regarding the application and submitted the same to the Director, together with certain findings of fact and recommendations (App. III of Petition, pp. 28-35). The respondent Director thereafter entered an order adopting the findings of fact and recommendations of the hearing officer, and pursuant to the authority vested in him by the Community Currency Exchange Act, he ordered the issuance of a license to respondent Margaret M. Kane (App. II of Petition, pp. 35-36).

Petitioner Des Plaines Currency Exchange, Inc., an Illinois Corporation, is and was the operator of a competing currency exchange located four-fifths of a mile from the currency exchange proposed to be operated by respondent Margaret M. Kane. At the hearing conducted before the hearing officer, the petitioner objected

to the issuance of a license to respondent Kane on the grounds that petitioner's financial structure and business would be injured by the competition. The petitioner was afforded an opportunity to, and did, present evidence in support of its objections (App. III of Petition, pp. 28-33).

After obtaining a stay of enforcement of the respondent Director's order, the petitioner appealed to the Circuit Court of Cook County, Illinois. By its own admission, petitioner's contentions in the said Circuit Court were limited to the allegations that (1) the Director failed to examine the record before reaching his decision, and that (2) the Director improperly delegated power to make recommendations to a hearing officer and thereafter illegally considered those recommendations without giving the petitioner the opportunity to oppose them (Petition pp. 4-5). No constitutional question was ever raised in the Circuit Court; indeed, petitioner readily admits that it "did not specifically contend that the statute was in violation of the United States Constitution" (Petition p. 5). In affirming the administrative decision, the Circuit Court expressly found that the findings and conclusions of the hearing officer which were adopted by the respondent Director correctly reflected the testimony and evidence offered at the hearing (App. II of Petition, pp. 26-67).

The petitioner thereupon appealed the decision of the Circuit Court of Cook County, Illinois, to the Supreme Court of Illinois, which affirmed in a written opinion (App. I of Petition pp. 18-23). No constitutional issue was presented to the Supreme Court of Illinois when the case was originally briefed and argued. Thus petitioner is forced to concede that "the question of denial of rights under the Federal Constitution was presented

for the first time as a result of the decision of the Illinois Supreme Court and was asserted in a petition for rehearing" (Petition p. 5). Nor was there a federal question decided even after the petition for rehearing was denied. In referring to the supposed deprivation of due process arising out of the alleged failure to provide petitioner with a copy of the hearing officer's report, the Supreme Court of Illinois stated:

> "A decision on this question is not, however, necessary in the present case, for there is nothing in the record before us to indicate that the hearing officer's report was unavailable to the parties prior to the Director's decision or that the (petitioner) ever requested a copy of said report, which was dated 13 days prior to the Director's order."

Thus, although petitioner predicates its entire petition upon the proposition that it was deprived of due process of law, it must ultimately admit that "concededly the Supreme Court of Illinois did not expressly decide the question raised herein" (Petition p. 13).

REASONS FOR DENYING THE WRIT

(1) This Court lacks jurisdiction to entertain the writ. No right under the Constitution of the United States has been "specially set up or claimed" as is required under 28 U.S.C.A. Section 1257(3), the statutory provision alleged to confer jurisdiction.

Petitioner is not being deprived of its property without due process of law because none of petitioner's property is at stake. Although petitioner's currency exchange license may be considered a property right which is protected by constitutional guarantees, petitioner certainly enjoys no property right in its present freedom from

competition. On the contrary, petitioner's good fortune in serving an area in which there are no competing currency exchange businesses is a temporary privilege which may be revoked at any time the respondent Director determines that the community will be better served by the creation of additional currency exchange facilities. Ill. Rev. Stats. 1961, Ch. 16½, par. 34.1. Compare *Ashbacker Radio Corp.* v. *Federal Communications Comm.*, 326 U.S. 327, which held that a radio station licensee does not obtain any vested interest in any frequency under the Federal Communications Act of 1934. Mere governmental acts of grace do not confer upon their beneficiary any vested rights protected by the Federal Constitution. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537. Inasmuch as petitioner has no vested right to a governmental gratuity, this proceeding cannot constitute a deprivation of its property without due process of law, and no federal question is involved. Accordingly, review by this Court is unwarranted.

But even if it is assumed *arguendo* that petitioner's present contentions concern its Constitutional rights, this Court nevertheless lacks jurisdiction to grant the writ. In order to invoke the jurisdiction of this Court, petitioner must demonstrate that it raised the federal question at the appropriate stage of the State Court proceedings. *Beck* v. *Washington*, 369 U.S. 541, 550; *Ferguson* v. *Georgia*, 365 U.S. 570, 572; *In re Lamkin*, 355 U.S. 59. Petitioner has already conceded that it did not raise the supposed Constitutional issue until it filed its petition for rehearing in the Supreme Court of Illinois. Under the Illinois procedure, the issue was waived because it had not been raised in the lower state tribunals. *City of Chicago* v. *Shayne*, 27 Ill. 2d 414, 189 N.E. 2d 324; *Saladino* v. *City of South Beloit*, 9 Ill. 2d 589, 137

N.E. 2d 364. Moreover, this Court has held on numerous occasions that raising the federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless the State Court actually grants the petition and expressly decides the federal question. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (6); *Hanson* v. *Denckla*, 357 U.S. 235, 243-44; *Herndon* v. *Georgia*, 295 U.S. 441, 443; *American Surety Co.* v. *Baldwin*, 287 U.S. 156. In the case at bar, the petition for rehearing was never granted and the Supreme Court of Illinois never decided the issue. Nor can the petitioner claim that it was prevented from raising the Constitutional issue at an earlier stage of the proceeding. Petitioner's complaints about the alleged secrecy of the hearing officer's report and the lack of opportunity to attack it began as early in the litigation as the Circuit Court of Cook County, Illinois (Petition, pp. 4-5). However, it was not until the filing of the petition for rehearing that Constitutional rights were invoked in support of these complaints. Since the alleged Constitutional infirmities were not properly urged in the State Courts, there is no basis for granting review by this Court on certiorari.

Wholly apart from the fact that the federal question was never properly presented, it is apparent from the opinion of the Supreme Court of Illinois that the decision of the court was not based on federal grounds. Rather, that court simply held that the administrative decision was based upon the testimony and other evidence received at the hearing, and no decision on the effect of the alleged unavailability of the report was deemed necessary because there was no evidence in the record indicating its unavailability. Because the opinion of the Supreme Court of Illinois did not render a decision

based upon a federal right, and because the decision is founded exclusively upon adequate non-federal grounds, there is no basis for review by this Court. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-6.

The petitioner has also urged that it was deprived of its property without due process of law because it was never afforded an opportunity to litigate the issue of whether the Director examined the record (Petition 15-16). This due process argument is of such recent vintage that petitioner did not even urge it in the petition for rehearing filed in the Supreme Court of Illinois. Once again the point cannot be considered because it was not urged or briefed below. *California* v. *Taylor*, 353 U.S. 553, 557; *Lawn* v. *United States*, 355 U.S. 339, 362.

(2) There is no conflict between the decisions of this Court and the decision herein sought to be reviewed. The Supreme Court of Illinois did not pass upon the issue of whether the Federal Constitution required the hearing officer's report to be made available to petitioner. After remarking that Professor Davis rejected the idea that this was a constitutional requirement (2 Davis, Administrative Law, sec. 11.09), the Illinois court found that it was unnecessary even to consider the question because the record did not show the report to be unavailable or that petitioner was deprived of an opportunity to object thereto. Thus, there is no conflict between this decision and the decisions which petitioner contends enunciate the principle that the report must be made available.

Petitioner urges that the Illinois court improperly avoided the constitutional issue, and that this Court ought to look behind the "avoidance" and grant the writ. Such a contention comes with ill-grace from a party which did not properly urge the issue in the state court,

and did not prove the factual basis for its present complaint. In any event, the case upon which petitioner relies in support of its contention is in no way pertinent. In *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, the Constitutional issue of free speech was properly presented in the state court, and this Court accepted the state court's factual determination concerning the nature of the picketing there involved. The case in no way holds that this Court is authorized to look behind state court findings of fact just because constitutional claims are made.

Finally, there is no basis for petitioner's argument that this Court has established a constitutional requirement of availability and opportunity to object to all interim reports prepared in the administrative process. Neither *Gonzales* v. *United States*, 348 U.S. 407, nor *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, announced such a broad constitutional principle. In *Gonzales*, an alleged conscientious objector was convicted for his refusal to submit to induction into the armed forces. This Court reversed the conviction, holding that the draft classification upon which the conviction was founded was illegal in that the defendant had never been furnished with written recommendations submitted to the administrative agency responsible for making the draft classification. The Court's holding was based upon its conclusion that the Universal Military Training and Service Act required that such a report be furnished to the draft registrant. No interpretation of constitutional rights was in any way involved. In *Willner*, an applicant for a license to practice law was denied a license despite the fact that he was never given a hearing or other opportunity to confront or cross-examine persons who submitted adverse reports about him. This Court held

that procedural due process had been violated, not because of the secrecy of advisory reports, but because the applicant was never afforded a hearing to rebut the accusations made against him.

CONCLUSION

This litigation involves an attempt by one business enterprise to guarantee its own success by using the administrative and judicial processes as an artificial means of preventing competition. By taking successive appeals through the court system of Illinois, petitioner has managed to postpone the operation of a competitor for several years. It now seeks to prolong this moratorium on competition by injecting into the late stages of this case a supposed constitutional issue which was never presented to nor decided upon by the lower courts. This Court ought not to grant certiorari to review petitioner's afterthought.

For all of the reasons advanced in this brief, it is respectfully urged that the petition be denied.

Respectfully submitted,

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